(18)

No. 96-454

In The
Supreme Court of the United States
October Term, 1996

Associates Commercial Corporation,
Petitioner,
v.
Elray Rash and Jean E. Rash,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF OF PETITIONER

Ben L. Aderholt
Raymond J. Blackwood
Chamberlain, Hrdlicka, White, Williams & Martin
1200 Smith Street
Suite 1400
Houston, Texas 77002
(713) 658-1818

Carter G. Phillips *
Shalom L. Kohn
David M. Schiffman
Jeffrey C. Steen
Sidley & Austin
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Counsel for Petitioner

* Counsel of Record

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Petitioner respectfully submits this reply to the briefs filed by respondents and their *amici curiae*, the National Association of Consumer Bankruptcy Attorneys, Inc. ("NACBA") and the National Association of Chapter Thirteen Trustees ("NACTT").

STATEMENT OF FACTS

In a recitation that is virtually devoid of any support in the record, respondents depict their chapter 13 case as a success that would not have been possible under petitioner's interpretation of the Code. Of course, the relevant legal issue is the meaning of the phrase "proposed disposition or use" in 11 U.S.C. § 506(a) and that issue does not turn on any facts specific to respondents. But even taking respondents' assertions at face value,[1] it is

[1] Much of respondents' factual recitation is not just unsupported by the record, but wrong. One particular point merits a response. Respondents assert that they did not want to surrender the truck because they "had too much equity in it to just give it up." Resp.

apparent that Mr. Rash's trucking business suffers from fundamental economic flaws that no chapter 13 plan could cure, except temporarily.

The plan allowed respondents to reduce their monthly payments on the truck loan from $1,610 to $680. Jt. App. 93. Yet, even with that relief, they have barely managed to scrape by. Respondents say they would not have been able to pay the extra $215 a month that would have been required under petitioner's interpretation of the statute. Resp. Br. 13. If that is true, Mr. Rash's business is doomed in any case because he now needs to replace the truck (*id.*), which will require him to make loan payments that are far more than he is now paying.

Thus, the chapter 13 plan has merely postponed the demise of Mr. Rash's trucking business, and in the meantime he has earned much less than the prevailing union wage, *id.* at 39, which he could have received had he gone to work for someone else as a truck driver rather than trying to maintain his own business. In short, Mr. Rash's chapter 13 case cannot be characterized as a success from the debtor's standpoint, and certainly provides no policy justification for deciding this case in a manner that favors debtors at the expense of secured creditors.

ARGUMENT

THE BANKRUPTCY CODE REQUIRES A REPLACEMENT VALUATION OF COLLATERAL THAT THE DEBTOR PROPOSES TO RETAIN AND USE

There is no disagreement among the parties and *amici* on two key points. First, the value of an asset depends upon its proposed disposition or use. Property is generally

Br. 5. The bankruptcy judge, however, expressly found that "Debtor does not have equity in the truck." Pet. App. 119a. Indeed, the issue presented in this case can only arise when the debtor has no equity in the collateral. If the collateral is worth more than what the debtor owes, then the Bankruptcy Code requires full payment.

worth more to a debtor who uses it than to a creditor who must dispose of it. This difference in value is well recognized in the "blue books" discussed in the briefs, and in the appraisal principles cited by respondents.[3] Second, there is a consensus that the Seventh Circuit's "split the difference" rule does not reflect any recognized valuation standard and is not a plausible interpretation of the Bankruptcy Code.

What is most striking about the briefs of respondents and their *amici* is the unwillingness to defend the essential reasoning of the decision below. They have abandoned the central premise of the court of appeals' holding, which is that § 506(a)'s language "must clearly compel" the result petitioner proposed. Pet. App. 10a. Petitioner demonstrated that its interpretation of § 506(a) did no violence to state law and that, to the contrary, it was the holding below that broadly cut back on the state law right of secured creditors to be paid in full. Pet. Br. 25-27. Respondents and their *amici* effectively demonstrate the fundamental flaw in the court of appeals' approach by abandoning completely any reliance on a clear statement requirement.[4] Moreover, they simply ignore the remaining problem: It is they who seek to modify petitioner's state law rights and therefore it is they who must demonstrate that this proposed result is compelled by the language of the statute. Of course, that

[3] *See* Appraisal Standards Board, *Uniform Standards of Professional Appraisal Practice*, Standards Rule 7-3, at p. 73 (1996 ed.) ("personal property has several measurable marketplaces, and the appraiser must identify, define, and analyze the appropriate market consistent with the purpose of the appraisal"). The official comment to this rule points out that "a property may have distinct value at a wholesale level of trade, a retail level of trade, or . . . under varying auction conditions."

[4] The Fifth Circuit relied heavily upon *BFP* v. *Resolution Trust Corp.*, 511 U.S. 531 (1994). Pet. App. 9a-10a. Tellingly, respondents only cite *BFP* with respect to federal regulation of appraisals; the NACBA cites the case twice with respect to the meaning of fair market value; and the NACTT does not cite the case at all.

is a burden they never accept, much less come close to satisfying.

Given the common ground between the parties and respondents' effective concession that the court of appeals' central premise is insupportable, it becomes plain that petitioner's proposed interpretation of § 506(a) is unquestionably correct. Indeed, its interpretation is completely faithful to the language of the statute, and none of the arguments offered by respondents or their *amici* remotely justifies interpreting § 506(a) to restrict the value of the collateral retained and used by the debtor by treating it as if the debtor had surrendered the property. *A fortiori*, nothing they argue compels such a conclusion.

A. Respondents' Interpretation of § 506(a) Ignores the Congressional Directive That Value Depends on the "Proposed Disposition or Use"

The decisive issue in this case is what Congress meant when it declared in § 506(a) that "value shall be determined in light of . . . the proposed disposition or use of such property." The most natural—indeed, the only sensible—reading is that bankruptcy judges should select the measure of value that corresponds to "the proposed disposition or use."

Respondents reject this straightforward interpretation of the statute, but neither they nor their supporters have been able to give this phrase any other cogent meaning. Petitioner has already demonstrated the fallacies in the Fifth Circuit's attempt to give meaning to this phrase. Pet. Br. 15-16. Respondents' *amicus* agrees that the Fifth Circuit's attempt to give the term "use" some meaning—by suggesting that it instructs courts to adjust value for uses involving rapid depreciation—is contrary to the structure of the Code and fundamental concepts of value. See NACBA Br. 16-17. Respondents try to give this phrase meaning by stating that valuation should reflect the use of the truck *as collateral*. Resp. Br. 16. This

reading of "use" is not only most unnatural, but virtually meaningless. Collateral is *always* used as collateral—and § 506(a) clearly treats "proposed . . . use" as a variable, not as a constant.

The NACBA offers a different explanation. In its view, Congress adopted the "proposed disposition or use" language to address a valuation issue that sometimes arises with farmland—whether the property should be valued based on its *actual* agricultural use or its *highest and best* use if developed. NACBA Br. 14. Although there is a split of authority on this point, *neither* line of cases suggests that the creditor's recovery is limited to what it could obtain by foreclosing on its mortgage; under both approaches, the secured creditor is entitled to receive *at least* what the debtor would have to pay to purchase similar land used for the same purpose.[4] In any event, Congress surely was not focusing on this esoteric valuation issue when it adopted § 506(a). Instead, it was attempting to give courts guidance on the more fundamental question of when a liquidation standard is appropriate and when a going concern or fair market value standard should be chosen. See Pet. Br. 39-40.

B. Respondents' Strained Interpretation Is Not Needed to Give Meaning to the Phrase "Creditor's Interest"

Respondents attempt to justify giving short shrift to the "proposed disposition or use" language of § 506(a) by arguing that petitioner's interpretation ignores the phrase "creditor's interest." As the NACBA puts it:

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[4] *Compare, e.g., In re Foster*, 79 B.R. 906, 908 (Bankr. D. Mont. 1987) (requiring debtor to pay the "fair market value" of comparable farmland, rather than the higher value of the land if subdivided) *with Speck v. United States (In re Speck)*, 104 B.R. 1021, 1023-24 (D.S.D. 1989) (requiring the debtor to pay "the fair market value of the property; i.e., 'the price which a willing seller under no compulsion to sell and a willing buyer under no compulsion to buy would agree upon after the property has been exposed to the market for a reasonable time' ").

The "creditor's interest" can have no meaning if the debtor's interest is the interest being measured. If Congress had intended the secured claim to be measured by the value to the debtor of retaining or using the vehicle, Congress could have simplified § 506(a) to read "an allowed secured claim of a creditor . . . is a claim to the extent of the value of the use to the debtor of the property securing the claim."

NACBA Br. 3.[5]

This argument mischaracterizes petitioner's position. Associates is not arguing that collateral should *always* be valued from the debtor's perspective.[6] If the collateral is surrendered, then the valuation should indeed be based on what the creditor could obtain. For that reason, the "simplified" phraseology that the NACBA suggests would not have sufficed given the range of cases that Congress needed to address.[7] Under petitioner's interpretation, by contrast, the phrase "creditor's interest" serves two important purposes. First, it clarifies that the creditor's secured claim cannot exceed the amount of the debt even

[5] Of course, this language would not satisfy respondents, who still would argue that "use" means use as collateral. This is still unnatural, but it casts doubt on *amicus*'s assertion that its approach is either simpler or more effective than Congress's.

[6] This is why Congress did not use the term "debtor's interest" in § 506(a). Thus, the failure to incorporate that term, which the NACBA notes appears elsewhere in the statute, does reflect a purposeful choice, just not the one the NACBA asserts (Br. 11). Instead, Congress merely declined to value property the same way in all cases; valuation depends upon the disposition or use of the property in each case.

[7] The NACBA erroneously states that "if the debtor elects to surrender the property through the Chapter 13 plan no judicial valuation of the secured claim is undertaken at all." NACBA Br. 6. In reality, however, a judicial valuation of the collateral value is needed to determine the amount of the creditor's *unsecured* deficiency—at least in those cases where the creditor has not yet sold the collateral. *See* § 506(a) (amount of claim in excess of collateral value is an unsecured claim).

if the collateral is worth more.[8] Second, this phrase is necessary because, as even the court below recognized, "[t]he creditor's lien may only be a partial lien or it may be junior to other liens also secured by the estate's interest in the property." Pet. App. 13a.

Recognizing that its interpretation of the phrase "creditor's interest" is at odds with this Court's interpretation, the NACBA goes to great lengths (NACBA Br. 8-10) to argue that the Court did not mean what it plainly stated, when it observed in *United Savings Ass'n* v. *Timbers of Inwood Forest Assocs.*, 484 U.S. 365 (1988), that the first sentence of § 506(a) requires a valuation of the collateral, and not a valuation of the creditor's lien. Although there is no reason to believe, as *amicus* proposes, that the Court was confused, *amicus* completely ignores the other prior decisions of this Court that reach exactly the same conclusion. See Pet. Br. 31-32 (citing *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 239 (1989); *Nobelman* v. *American Sav. Bank*, 508 U.S. 324, 328 (1993)). In fact, the distinction that this Court drew in *Timbers* was central to the holding.

Timbers resolved a conflict among the circuits about the rights of an undersecured creditor when the automatic stay prevents it from foreclosing during the pendency of a bankruptcy case. Section 361 provides that the creditor is entitled to adequate protection "to the extent that the stay . . . results in a decrease in the value of such entity's interest in such property." The issue in *Timbers* was whether adequate protection requires the payment of interest to compensate the creditor for the delay in exercising its foreclosure rights. The Ninth Circuit had allowed such compensation, and it reached that result by drawing a distinction between (1) "the creditor's interest"

[8] If this phrase were omitted, § 506(a) would state that the creditor has "a secured claim to the extent of the value of the estate's interest in such property"—which may exceed the amount of the debt.

arising from its lien, and (2) the property serving as collateral. In the Ninth Circuit's view, § 361 protected "the secured creditor's interest and not merely the value of the collateral." *Crocker Nat'l Bank* v. *American Mariner Indus., Inc. (In re American Mariner Indus., Inc.)*, 734 F.2d 426, 430 (9th Cir. 1984).

This Court, however, adopted a different interpretation of the statutory phrase "value of such entity's interest in such property." The Court held that this phrase refers to the value of the underlying collateral, and *not* to the value of the bundle of rights a creditor has by virtue of its lien. In reaching this conclusion, the Court pointed out that § 506(a) contains essentially the same phrase, and should be interpreted in the same manner. "The phrase 'value of such creditor's interest' in § 506(a) means 'the value of the collateral.'" *Timbers*, 484 U.S. at 372 (quoting H.R. Rep. No. 95-595, at 181, 356 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6141, 6312). In short, the first sentence of § 506(a) requires bankruptcy judges to determine the value of the property subject to the lien, not the value to the creditor of having a lien.[9]

[9] The NACBA also suggests (Br. 10) that this Court endorsed a foreclosure value standard in *Timbers* because the opinion mentioned the fact that the bankruptcy judge had "conditioned continuance of the stay on monthly payments [of interest] . . . on the estimated amount realizable on foreclosure." 484 U.S. at 369. But the Court's opinion does not even hint at any endorsement of a foreclosure value standard under the circumstances there (which in any event are quite different from the circumstances here). The bankruptcy judge in *Timbers* had valued the collateral for the purpose of determining how much the creditor should be compensated for being denied the opportunity to foreclose; the court thought it fair to award interest based on the estimated foreclosure proceeds. Currently, there is a split of authority among the lower courts about whether a foreclosure standard should be used for adequate protection purposes. *Compare, e.g., In re Demakes Enters., Inc.*, 145 B.R. 362 (Bankr. D. Mass. 1992) (liquidation value) *with General Elec. Credit Corp.* v. *QPL Components, Inc. (In re QPL Components, Inc.)*, 20 B.R. 342, 346 (Bankr. E.D.N.Y. 1982) (retail fair market value); *see also* Chaim J. Fortgang & Thomas M.

More broadly, the *Timbers* opinion was based on the balance struck in the Code between the rights of secured creditors and the needs of a reorganization. Although undersecured creditors were denied interest during the proceeding, they were entitled to relief from the stay if an effective reorganization was not in prospect within a reasonable time. *Id.* at 375-76. And this balance was struck in the context of the lower court's unchallenged statement that, if the reorganization were successful, the secured creditor would benefit by recovering the going concern value of the collateral. *United Sav. Ass'n* v. *Timbers of Inwood Forest Assocs.* (*In re Timbers of Inwood Forest Assocs.*), 808 F.2d 363, 373 (5th Cir. 1987) (*en banc*) ("The secured creditor benefits from a successful reorganization because its secured claim is *valued on a going-concern basis* in connection with a plan of reorganization, and the secured creditor is not compelled to liquidate its collateral at forced-sale prices") (emphasis added). How any of this supports respondents' advocacy of a liquidation valuation for property retained in a reorganization is mystifying.

C. The Practice Under Prior Bankruptcy Statutes Does Not Support Respondents' Interpretation of § 506(a)

Respondents and their *amici* contend that secured creditors should not be paid more than the disposition value of collateral because that is all they could recover under prior bankruptcy law. But, as shown below, Congress intended to rewrite the law in this area, not codify existing practices. Both of the statutory provisions at issue in this case are new. Indeed, under the Bankruptcy Act, a debtor in respondents' position who wanted to keep collateral would have to repay the full debt, and not just disposition value. In short, prior practice is not relevant, and in any event does not support respondents.

Mayer, *Valuation in Bankruptcy*, 32 U.C.L.A. L. Rev. 1061, 1069 & n.36 (1985) (citing split).

1. Congress clearly intended the Code to be a complete overhaul of the rules governing secured creditors in bankruptcy. "One of the *more significant changes from current law* in proposed title 11 is the treatment of secured creditors and secured claims." H.R. Rep. No. 95-595, at 180 (1977) (emphasis added), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6141. Congress found that under prior law, "secured creditors [were] dealt with erratically, tediously, and uncertainly, resulting from a hodgepodge of state and federal statutory provisions, bankruptcy and local rules, many conflicting reported cases and varied local customs." S. Rep. No. 95-989, at 13 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5799. This Court has previously recognized that the Code was intended to revamp the rules dealing with secured creditors, and thus found no basis for indulging in "a presumption of continuity with pre-Code practice." *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 244-46 (1989).

2. The two statutory provisions at issue in this case certainly cannot be regarded as a continuation of pre-Code practice. Section 506(a) established a "*new* treatment of secured claims, especially the bifurcation of the claims into secured and unsecured claims." H.R. Rep. No. 95-595, at 181, 1978 U.S.C.C.A.N. at 6141 (emphasis added).[10] The cramdown power of § 1325(a)(5) is likewise new, as respondents and their *amici* admit; Chapter XIII of the Bankruptcy Act did not give debtors the power to modify their secured debts over the creditor's objection. On the contrary, chapter XIII "left secured creditors virtually unaffected" because "[e]ach secured creditor had to accept the plan before it could be con-

[10] The House Report noted "the uncertain treatment of secured creditors under current law," particularly when the creditor is *under*secured: "Current law is ambiguous and vague, especially under chapter XIII, on whether an undersecured creditor is to be treated as a secured creditor, or as a partially secured and partially unsecured creditor." H.R. Rep. No. 95-595, at 181, 1978 U.S.C.C.A.N. at 6141-42.

firmed." Resp. Br. 25; see 11 U.S.C. § 652(1) (1976 ed.; repealed).[11] Except for certain kinds of reorganizations, "no provision of the pre-Code statute permitted involuntary reduction of the amount of a creditor's lien for any reason other than payment on the debt. . . . Congress must have enacted the Code with a full understanding of this practice." *Dewsnup* v. *Timm*, 502 U.S. 410, 418-19 (1992).[12] And finally, to the limited extent that certain reorganizing companies could restructure their secured debts under the Bankruptcy Act, there was substantial authority for valuing the collateral on a going concern basis, including a scholarly decision issued just prior to the congressional consideration of the Code. *In re Pine Gate Assoc.*, 3 B.C.D. 301, 305-10 (Bankr. N.D. Ga. 1977) (Norton, J.). See generally Isaac M. Pachulski, *The Cram Down and Valuation Under Chapter 11 of the Bankruptcy Code*, 58 N.C. L. Rev. 925, 959-60 (1980). There was certainly no well-established pre-Code practice allowing debtors to retain collateral by paying liquidation value.

[11] It is true that a few courts asserted an "equitable" power to restructure secured debts in chapter XIII cases. *E.g.*, *Garcia* v. *General Motors Acceptance Corp.* (*In re Garcia*), 396 F. Supp. 518, 523 (C.D. Cal. 1974). But this was not the norm. *See* Resp. Br. 25; NACTT Br. 8.

[12] Most Bankruptcy Act reorganization cases were brought under chapter XI, which did *not* allow any restructuring of secured claims. *See SEC* v. *United States Realty & Improvement Co.*, 310 U.S. 434, 452 (1940). Although chapters X and XII authorized such restructurings, there was almost no case law discussing what valuation standard should be used—perhaps because in chapter X cases, which generally involved public companies, secured creditors were usually paid in full; otherwise, under the absolute priority rule, shareholders would receive nothing. The typical valuation in chapter X cases involved the determination of going concern value, as determined through a capitalization of earnings for the enterprise as a whole. *See Report of the Commission on the Bankruptcy Laws of the United States*, H.R. Doc. No. 93-137 (1973) ("*Commission Report*"), *reprinted in* L. King, *Collier on Bankruptcy* Vol. B, at App. Pt. 4-516 to 4-517 (15th ed. 1996).

3. The "bankruptcy rule" discussed by respondents' *amicus* (NACBA Br. 19-21) deals with the situation where the secured creditor recovers the collateral and, in addition, wants to receive the balance of its claim as an unsecured creditor. Under this rule, a lienholder "may avail himself of his security and share in the general assets as to the unsecured balance"; but the court first deducts the amount that the creditor received (or can be expected to receive) from disposition of the collateral. See *United States Nat'l Bank* v. *Chase Nat'l Bank*, 331 U.S. 28, 34 (1947). The same result obtains under § 506(a) of the Code when the debtor surrenders the collateral. But this rule sheds no light on how the court should value collateral which the debtor does not surrender and chooses to keep.

In sum, the Bankruptcy Code gives chapter 13 debtors a new statutory right—the right to keep collateral without paying the full debt it secures. To decide how much debtors should pay to exercise this new right, the Court should not look to the old law; it should look to the Code.

D. Neither the Legislative History Nor Subsequent Congressional Inaction Supports Respondents' Interpretation of the Statute

Although respondents and their *amici* cite bits of legislative history, those fragments cannot obscure one central fact. Respondents are urging this Court to adopt a single valuation standard for every case,[13] yet the legislative history, consistent with the rest of the statute, unambiguously rejects any single standard and states that, in some circumstances, courts should use the "full going concern value." See Pet. Br. 32 n.15, 39.[14]

Respondents' *amici* also rely on congressional *inaction* to support their position. In 1983, the Senate passed a bill containing comprehensive revisions of the Bankruptcy Code, including a provision that would have specified a resale market value standard—a result that some lower courts had already reached. See, *e.g.*, *In re Reynolds*, 17 B.R. 489, 493 (Bankr. N.D. Ga. 1981). Other courts had applied liquidation value, and the Senate Judiciary Committee thought an amendment was necessary because "the original intent of the Congress in this regard has not been uniformly carried into practice by the courts." S. Rep. No. 98-65, at 5 (1983). Because this provision was not ultimately included in the 1984 amendments to the Bankruptcy Code, *amici* ask this Court to infer that Congress must have disapproved of this interpretation. But the failure of Congress to take sides on an issue dividing the bankruptcy bench cannot fairly be read as an endorsement of either position. For that reason, this Court has repeatedly refused to infer legislative intent from mere inaction, most recently in *California Division of Labor Standards Enforcement* v. *Dillingham Construction, N.A., Inc.*, 117 S. Ct. 832, 841 n.8 (1997) (failure of Congress to enact bills overruling lower court decisions given no weight). See also *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 114 (1989); *United States* v. *Price*, 361 U.S. 304, 313 (1960).

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[13] According to respondents, the only valuation standard permitted under § 506(a) is "the probable net proceeds to the secured creditor if the secured creditor had repossessed and sold its collateral." Resp. Br. 14; *see also* NACBA Br. 4 ("the expected net recovery on a hypothetical surrender of the property").

[14] The NACTT's reliance (Br. 9) on the recommendation of the *Commission Report* is misplaced, because Congress rejected the Commission's proposal. See Pet. Br. 39 & n.19, which notes the Senate Judiciary Committee's inclusion of the second sentence of § 506(a) to make it clear that value depends on the proposed disposition or use.

E. The Fair Market Value Standard, Unlike the Foreclosure Value Standard, Accords With Customary Appraisal Standards

Respondents contend at length that this Court should not adopt a fair market value standard based on what the debtor would have to pay to obtain comparable property because it "radically departs from traditional appraisal theory" and would require "fundamental alterations in appraisal methodology." Resp. Br. 26, 20. Nothing could be further from the truth. Petitioner is simply asking this Court to apply "the traditional common-law notion of fair market value." *BFP* v. *Resolution Trust Corp.*, 511 U.S. 531, 548 (1994). In *BFP*, this Court quoted with approval the following definition:

> "The market value of . . . a piece of property is the price which it might be expected to bring if offered for sale in a fair market; not the price which might be obtained on a sale at public auction or a sale forced by the necessities of the owner, but such a price as would be fixed by negotiation and mutual agreement, after ample time to find a purchaser, as between a vendor who is willing (but not compelled) to sell and a purchaser who desires to buy but is not compelled to take the particular . . . piece of property."

Id. at 537-38 (quoting *Black's Law Dictionary* 971 (6th ed. 1990)).

This formulation of the fair market value standard is virtually identical to the one advocated by respondents. See Resp. Br. 27. It is the very standard that appraisers customarily use, and indeed they are required to use such a standard when valuing real estate collateral in federally regulated transactions. See 12 C.F.R. § 34.42(g). The fair market value standard is well understood by courts and appraisers alike. The "foreclosure value" standard, by contrast, would require appraisers to depart from their normal practice. As this Court noted, "[a]n

appraiser's reconstruction of 'fair market value' could show what similar property would be worth if it did not have to be sold within the time and manner strictures of state-prescribed foreclosure." *BFP*, 511 U.S. at 539. However, "market value, as it is commonly understood, has no applicability in the forced-sale context; indeed, it is the very *antithesis* of forced-sale value." *Id.* at 537 (emphasis in original).

Appraisers can use several approaches to determine fair market value. For motor vehicles, homes and other types of readily marketable property, appraisers commonly employ the *comparable sales* method—they look at the prices paid for similar properties. That is the approach used by *both* expert witnesses in this case, each of whom consulted industry publications to determine the prices paid for 1989 Kenworth T600A tractors. For other types of property, appraisers may use the *capitalized income* approach or the *replacement cost* approach.[16] All of these techniques can be used where appropriate to determine fair market value.

Respondents contend that trucks should not be valued using published retail figures because the "reported values are universally recognized as unreliable." Resp. Br. 26-27. But no evidence or literature is cited in support of this assertion. In fact, respondents' own expert witness relied on the published *retail* value to arrive at his estimate of wholesale value: "I took the figures from the truck blue book to establish the retail price, [then] backed off 25 percent for wholesale price." Jt. App. 79. In any event, the reliability of a particular published value is an evidentiary matter that this Court need not address; some ex-

[16] Respondents are correct in pointing out that the term "replacement cost" is used in different ways. The panel opinion below used that phrase to refer to the cost of purchasing a comparable used truck. Pet. App. 104a-105a. To an appraiser, this is the *sales comparison* approach. Appraisal Institute, *The Appraisal of Real Estate* 71, 367 (10th ed. 1992). The replacement cost approach involves determining the cost of building or purchasing a brand new replacement with utility equivalent to the item being appraised, and then deducting depreciation. *Id.* at 318, 319.

perts may not rely on the blue book, and others may conclude that adjustments are necessary.[16]

The legal question here is *which* market is the relevant one—the market in which the debtor would buy such collateral if he chose to *use* it or the one in which the creditor would *dispose* of it. Once the relevant market is defined, the bankruptcy courts, as triers of fact, will decide the best way of ascertaining market value on the basis of the evidence presented. For the reasons explained earlier, the selection of the relevant market turns on the "proposed disposition or use of such property," as set forth in § 506(a). In this case, respondents propose to use the truck, so the relevant measure of value is what it would cost them to purchase a comparable vehicle.

CONCLUSION

For the foregoing reasons and those stated in petitioner's opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

BEN L. ADERHOLT
RAYMOND J. BLACKWOOD
CHAMBERLAIN, HRDLICKA, WHITE, WILLIAMS & MARTIN
1200 Smith Street
Suite 1400
Houston, Texas 77002
(713) 658-1818

CARTER G. PHILLIPS *
SHALOM L. KOHN
DAVID M. SCHIFFMAN
JEFFREY C. STEEN
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Counsel for Petitioner

April 9, 1997

* Counsel of Record

[16] Petitioner agrees with respondents that published values "should not be the exclusive reference point" (Resp. Br. 37), and that adjustments may be appropriate to reflect the condition of the vehicle (*e.g.*, mileage, damage, accessories). In this case, respondent testified that his truck was in "average good condition" (Jt. App. 66), and neither expert saw any reason to make any adjustment because of the condition of the vehicle. Jt. App. 69, 79-80.